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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

BYRON THORNHILL,

Petitioner

v.

STATE OF ALABAMA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOS. S. LAWSON,
Attorney General of Alabama,
For The State of Alabama.

WILLIAM H. LOEB,
Assistant Attorney General,
On The Brief.

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OPINION OF THE COURT BELOW

I.

The opinion of the Court of Appeals of Alabama which petitioner asks this Court to Review is reported in 189 So. 913, certiorari denied, without opinion, by the Supreme Court of Alabama, 189 So. 914.

II.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court to review the judgment of the Court of Appeals rendered on January 17, 1939. The statutory provision which petitioner relies upon as giving this Court jurisdiction is Section 237 (b) of the United States Judicial Code, as amended by an Act of February 13, 1935, 43 Statutes 939 (Section 344, Title 28, U. S. C. A.).

It is insisted by petitioner that the Court of Appeals has decided a Federal question of substance not heretofore determined by this Court or has decided it in a way not in accord with the applicable decisions of this Court, petitioner stating that the questions presented are:

> "1. Whether or not Alabama's anti-picketing law, Section 3448, supra, is violative of the XIVth Amendment to the Constitution of the United States in that it deprives the petitioner of freedom of speech and assemblage.
>
> "2. Whether or not the Alabama courts deprived the petitioner of the protection of the due-process of law clause of the XIVth Amendment, supra, by holding that petitioner's actions on the occasion in question, were within the purview of the prohibition implied in the statute; i. e. Section 3448."

III.

STATEMENT OF THE CASE

Petitioner was one of several persons on a picket line at the Brown Wood Preserving Company, Inc. at Brownville in Tuscaloosa County, Alabama, occupying such position on the picket line in pursuance to a strike order of November 24, 1937 (R. 9). It appears that some time after the issuance of the strike order, a notice was posted on the premises of the Brown Wood Preserving Company by the company notifying its employees that the plant would resume operations (R. 9). The chief witness for the State, Clarence Simpson, an employee of the Brown Wood Preserving Company and a non-Union man, testified that, having read the notice, he attempted to report to work on the date indicated therein; that when he reached the plant he saw a member of the Union, Byron Thornhill, this petitioner, on the picket line at the plant, and that Byron Thornhill "came out and told me they were on a strike and did not want anybody to go up there to work" (R. 10). It appears from Simpson's testimony that a picket line had been maintained around the plant since the time the strike had been called "with two picket posts on said line and about six or eight men on each picket post," and that "three shifts of men stay on the post in each tweny-four hours" (R. 9). According to Union member J. M. Walden, also a witness for the State, the picket "made assurance that there would be no work going on there" (at the Brown Wood Preserving Company plant) (R. 12).

No evidence was introduced by the defendant.

The petitioner was arrested for his activities in connection with the picket line, and prosecuted for violation of Section 3448 of the Code of Alabama, 1923, which provides as follows:

> "Section 3448. Loitering or picketing forbidden.—Any person or persons who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying, or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

The case was tried in the Inferior Court of Tuscaloosa County and from the judgment of conviction in that court petitioner appealed to the Circuit Court of the county. The solicitor of said Circuit Court duly filed his complaint against petitioner, and the defendant, failing to demand trial by jury, was placed on trial on December 20, 1937, before

the Circuit Court of Tuscaloosa County, sitting without a jury. The Court found the defendant guilty of the offense of loitering and picketing denounced by Section 3448, supra, and assessed a fine of $100 as punishment for the commission of said offense, whereupon, petitioner appealed to the Court of Appeals of Alabama, which, on January 17, 1939, affirmed the decision of the Circuit Court of Tuscaloosa County (189 So. 913). Rehearing was denied by the Court of Appeals on May 23, 1939, whereupon petitioner applied to the Supreme Court of Alabama for writ of certiorari to the Court of Appeals to review and revise the judgment and decision of that court, which writ was denied without opinion by the Supreme Court of Alabama on June 15, 1939 (189 So. 914).

ARGUMENT

I.

THIS COURT IS WITHOUT JURISDICTION TO REVIEW THE JUDGMENT OF THE COURT OF APPEALS OF ALABAMA IN THAT IT DOES NOT AFFIRMATIVELY APPEAR FROM THE RECORD THAT A FEDERAL QUESTION WAS NECESSARILY DECIDED IN DETERMINING THE CAUSE.

On appeal from the Circuit Court of Tuscaloosa County to the Court of Appeals of Alabama, the review sought by this petitioner involved questions of rights under the Constitution and laws of the State of Alabama and under the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals affirmed the judgment of the Circuit Court of Tuscaloosa County (189 So. 913), stating in its opinion that its decision was based entirely upon the former decisions of the Supreme Court of Alabama, as was required by statute (Code of Alabama, 1923, Section 7318). The Supreme Court cases cited as authority for its conclusion that Section 3448 of the Code of Alabama, 1923, (the forerunner of which was Section 6395 of the Code of 1907) was constitutional were *Hardie-Tynes Mfg. Co. v. Cruise et al*, 189 Ala. 66, 66 So. 657, and *O'Rouke v. City of Birmingham*, 27 Ala. App. 133, 168 So. 206, certiorari denied without opinion, 232 Ala. 355, 168 So. 209. The Hardie-Tynes case was the earlier of the two decisions, being decided November 17, 1914. In that case it is to be noted that

the Court made no reference to the Constitution of the United States in passing on the question presented to it for decision. The court merely stated:

"It is suggested by counsel for respondents that our construction of section 6395, as being an inhibition of picketing even where threats or violence are not used, renders it unconstitutional. *No intimation is offered as to what provision of the Constitution is thereby offended, and we can think of none.* Certain it is that a right to actively and directly interfere with and prevent the operation of a lawful business of another is not included among the inalienable rights of 'life, liberty, and the pursuit of happiness.' The 'liberty' guaranteed by the Constitution (article 1, section 1) is liberty regulated by law and the social compact, and in order that all men may enjoy liberty it is but the tritest truism to say that every man must renounce unbridled license. So, wherever the natural rights of citizens would, if exercised without restraint, deprive other citizens of rights which are also and equally natural, such assumed rights must yield to the regulations of municipal law. If one man asserts the constitutional rights of preventing another from the pursuit of a lawful business, what is to become of the undoubted constitutional right of that other person to pursue his business unmolested? It is clear that this notion of liberty utterly ignores 'the other fellow,' and denies to him the

very freedom it claims for itself." (Emphasis supplied)

Obviously, the Supreme Court was considering only the Constitution of Alabama.

In the O'Rouke case, decided on February 18, 1936, the Court of Appeals on the original hearing stated:

> "So far as we are able to ascertain the statutes in question are valid enactments and the provisions of the statutes in question in no manner offend *the Constitution of this state.* This is our conclusion after a careful and attentive consideration of the questions, in all of their phases, has been accorded." (Emphasis supplied)

It appears that the Court disposed of all the questions presented to it by basing its conclusions upon consideration of only the Constitution of Alabama. However, on rehearing it was insisted by counsel that the opinion be extended, and the Court, after stating that it had no inclination to deprive the appellant of any right or to restrict in any manner his right of review, held that the ruling of the trial court had no tendency to deprive the appellant of any rights guaranteed him by the provisions of the Fourteenth Amendment to the Constitution of the United States. The Supreme Court denied certiorari without opinion, and there is no showing that any Federal question was considered by that court—the highest court of the State of Alabama.

It therefore appears that the Court of Appeals of Alabama in its opinion in this case has not affirmatively stated that its decision rested upon the application of the Constitution of the United States. The Supreme Court of Alabama denied certiorari, thus affirming the judgment of the Court of Appeals, but without opinion (189 So. 914). The grounds of the decision of the Supreme Court are left to conjecture. Even assuming that it may be surmised, from the decisions quoted in its opinion, that the Court of Appeals intended to rest its decision upon a consideration of the Fourteenth Amendment, and that the denial of certiorari by the Supreme Court was upon the same ground, and not upon the non-federal ground of the application of the Constitution and laws of the State of Alabama, we call the Court's attention to the line of cases holding that jurisdiction cannot be founded upon surmise.

Eustis v. Bolles, 150 U. S. 361, 366, 367;

Lynch v. New York, 293 U. S. 52, 54;

Whitney v. California, 274 U. S. 357, 360, 361.

In *Lynch v. New York*, supra, it was stated:

> "It is essential to the jurisdiction of this Court, in reviewing a decision of a state that it must appear affirmatively from the record not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the

federal question was necessary to the determination of the case, and that it was actually decided or that the judgment rendered could not have been given without deciding it."

The Court also states in the Lynch case that:

"Where the judgment of the state court rests on two grounds, one involving a federal question and the other not, or if it does not appear upon which of two grounds the judgment was based, and the ground independent of a federal question is sufficient in itself to sustain it, this court will not take jurisdiction."

In the present case, the record shows that in the demurrer to the affidavit in the Inferior Court of Tuscaloosa County (R. 3, 4—Demurrer No. 4), in the demurrer to the complaint in the Circuit Court of Tuscaloosa County (R. 6, 7—Demurrer No. 4), and in the petition for certiorari to the Court of Appeals (R. 20, 21—Grounds No. 1, 3 and 6) counsel raised the constitutionality of the statute under both the Constitution of Alabama and the Constitution of the United States. Neither the decision of the Court of Appeals nor the decision of the Supreme Court of Alabama on certiorari specifically treats the questions involving the Fourteenth Amendment to the Constitution of the United States. It is submitted that since it does not affirmatively appear upon which of the two grounds the judgment of these courts was based, this Court should not now take jurisdiction of the cause.

It may be insisted, however, that judgment in this cause could not have been rendered without deciding the federal question. Both the Court of Appeals and the Supreme Court judicially knew that this Court had settled the constitutionality of satutory provisions calculated to prohibit *unlawful* picketing.

American Steel Foundries v. Tri-City Central Trades Council, 257 U. S. 184;

Truax v. Corrigan, 257 U. S. 312;

O'Gorman & Young, Inc. v. Hartford Fire Ins. Co., 282 U. S. 251, 267;

Senn v. Tile Layers Union, 301 U. S. 468, 479.

It is reasonable to presume, therefore, that these appellate courts of the State of Alabama, in considering this question, determined from the facts, as will be hereinafter shown, that what was involved was not an act of "peaceful picketing" but rather that there existed a picket line calculated to bring about fear and intimidation, together with the ensuing disturbances and breaches of the peace which so often follow such activities.

Applying the rule, therefore, that this Court will not resort to conjecture to determine whether the court of last resort of a State has passed on a federal question, it is submitted that the lack of jurisdiction is here clearly shown.

II.

SECTION 3448 OF THE CODE OF ALABAMA, 1923, IN ITS APPLICATION TO THIS PETITIONER HAS NOT DEPRIVED HIM OF ANY RIGHT GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

There is yet a further reason why this Court should not take jurisdiction of this cause. One attacking the constitutionality of a statute is the champion of no rights but his own.

> Henneford v. Silas Mason Co., 300 U. S. 577, 583.

This rule, when applied to this petitioner, can only result in this Court denying the petition.

In this case it has been shown that petitioner was a member of a picket line which was maintained on the property of the plant picketed throughout the twenty-four hour period of every day during which the strike existed, and that at least six men were on the picket line at all times. Petitioner now insists that Section 3448 of the Code of Alabama, 1923, prevents "peaceful picketing" and, therefore, amounts to an exercise of arbitrary power in violation of the due process of law provision contained in the Fourteenth Amendment.

It is respectfully submitted (assuming for the moment that Section 3448 does make unlawful "peaceful picketing", and that a statutory enactment prohibiting "peaceful picketing" is violative of the Fourteenth Amendment to the Constitution) that this petitioner is in no position to raise this constitutional question in this court for the reason that he was not "peacefully picketing" but, on the contrary, that it clearly appears from the evidence that the picket line of which he was a part was in such proximity to the plant, and of such numbers, as to indicate that its prime purpose was one of intimidation rather than peaceful pursuit.

This court in *American Steel Foundries v. Tri-City Central Trades Council et al.*, 257 U. S. 184, 204, speaking through the late Mr. Chief Justice Taft, in considering the decree of injunction in a labor controversy entered in the District Court for the Southern District of Illinois before the date of the Clayton Act (Oct. 15, 1914, C. 323, 38 Stat. 738), but which was pending on appeal in the Circuit Court of Appeals when the act was approved, after holding that Section 20 of the Clayton Act was enacted to forbid an injunction against peaceful picketing, concluded:

> "How far may men go in persuasion and communication and still not violate the right of those whom they would influence? In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the rights of others to en-

joy the same privilege. We are a social people and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free and his employer has a right to have him free.

"*The nearer this importunate intercepting of employees or would-be employees is to the place of business, the greater the obstruction and interference with the business and especially with the property right of access of the employer.* Attempted discussion and argument of this kind in such proximity is certain to attract attention and congregation of the curious, or, it may be, interested bystanders, and thus to increase the obstruction as well as the aspect of intimidation which the situation quickly assumes. *In the present case the three or four groups of picketers, were made up of from four to twelve in a group.* They constituted the picket lines. Each union interested, electricians, cranemen, machinists and blacksmiths, had several representatives on the picket line, and assaults and violence ensued. They began early

and continued from time to time during the three weeks of the strike after the picketing began. All information tendered, all arguments advanced and all persuasion used under such circumstances were intimidation. They could not be otherwise. It is idle to talk of peaceful communication in such a place and under such conditions. *The numbers of the pickets in the groups constituted intimidation. The name 'picket' indicated a militant purpose, inconsistent with peaceful persuasion.* The crowds they drew made the passage of the employees to and from the place of work, one of running the gauntlet. Persuasion or communication attempted in such a presence and under such conditions was anything but peaceable and lawful. When one or more assaults or disturbances ensued, they characterized the whole campaign, which became effective because of its intimidating character, in spite of the admonitions given by the leaders to their followers as to lawful methods to be pursued, however sincere. Our conclusion is that picketing thus instituted is unlawful and can not be peaceable and may be properly enjoined by the specific term because its meaning is clearly understood in the sphere of the controversy by those who are parties to it. We are supported in that view by many well reasoned authorities, although there has been contrariety of view. Barnes & Co. v. Typographical Union, 232 Ill. 424; Franklin Union v. People, 220 Ill. 355; Philip Henrici Co. v. Alexander, 198 Ill. App. 568; Vegelahn v. Gunt-

ner, 167 Mass. 92; Jonas Glass Co. v. Glass Association, 72 N. J. Eq. 653, s. c. 77 N. J. Eq. 219; Jersey City Printing Co. v. Cassidy, 63 N. J. Eq. 759; Frank & Dugan v. Herold, 63 N. J. Eq. 443; Goldberg, Bowen & Co. v. Stablemen's Union, 149 Cal. 429; Pierce v. Stablemen's Union, 156 Cal. 70; Local Union No. 313 v. Stathakis, 135 Ark. 86; Beck v. Teamsters' Union, 118 Mich. 497; In re Langell, 178 Mich. 305; Jensen v. Cooks' & Waiters' Union, 39 Wash. 531; St. Germain v. Bakery & Confectionery Workers' Union, 97 Wash. 282; Jones v. Van Winkle Gin & Machine Works, 131 Ga. 336; Union Pacific R. R. Co. v. Ruef, 120 Fed. 102; Atchison, Topeka & Santa Fe Ry. Co. v. Gee, 139 Fed. 582; Stephens v. Ohio State Telephone Co., 240 Fed. 759.

* * *

"Each case must turn on its own circumstances. It is a case for the flexible remedial power of a court of equity which may try one mode of restraint, and if it fails or proves to be too drastic, may change it. *We think that the strikers and their sympathizers engaged in the economic struggle should be limited to one representative for each point of ingress and egress in the plant or place of business and that all others be enjoined from congregating or loitering at the plant or in the neighboring streets by which access is had to the plant*, that such rep-

resentatives should have the right of observation, communication and persuasion but with special admonition that their communication, arguments and appeals shall not be abusive, libelous, or threatening, and *that they shall not approach individuals together but singly*, and shall not in their single efforts at communication or persuasion obstruct an unwilling listener by importunate following or dogging his steps. This is not laid down as a rigid rule, but only as one which should apply to this case under the circumstances disclosed by the evidence and which may be varied in other cases. It becomes a question for the judgment of the Chancellor who has heard the witnesses, familiarized himself with the locus in quo and observed the tendencies to disturbance and conflict. The purpose should be to prevent the inevitable intimidation of the presence of groups of pickets, but to allow missionaries." (Emphasis supplied)

The cases cited by the learned Chief Justice in support of his statements are all the authority needed to demonstrate that the petitioner should not be heard to complain that he is denied any essential inherent right by the application of Section 3448 of the Code of Alabama, 1923, to him.

Measured by the test laid down above there can be no doubt but that petitioner was a member of a group whose fixed purpose was the intimidation of those employees who were returning to work as re-

quested by the officials of the Brown Wood Preserving Company. In no sense of the word can petitioner's activity on such picket line be passed off as peaceful.

The statement of witness Walden (R. 12) that the picketers "made assurance that there would be no work going on" at the plant demonstrates the actual nature and character of the picket. It was a standing threat of violence to anyone so foolhardy as to resist its commands. The fact that on this particular occasion no violence was resorted to by Thornhill cannot control, for in the final analysis the threat of violence was present and must have had its effect upon those employees who sought to return to work.

The very word "picket" is borrowed from the nomenclature of warfare, and is strongly suggestive of a hostile attitude towards the individual or corporation against whom the labor union has a grievance. To quote Mr. Eddy,

> "It is conceivable, however, that a picket entirely lawful might be established about a factory, but such a picket would go no further than interviews and lawful persuasion and inducement. The slightest evidence of threats, violence, or intimidation of any character ought to be sufficient to convince court and jury of the unlawful character of the picket, since the picket under the most favorable consideration

means an interference between employer seeking employees, and men seeking employment."

1 Eddy on Combinations, Section 539.

It is not difficult to perceive that picketing by a great number of persons, such as in the instant case, tends to intimidate those who desire to become employees of the complainant, even though no acts of violence be committed. Manifestly, the use of a large number of pickets cannot reasonably be regarded as intended for a lawful purpose. The assembling of such a large number of picketers on the path leading to the Brown Wood Preserving Company plant, undoubtedly had a tendency to intimidate those persons who desired to work for the company whose place of business was so picketed. In *American Steel Foundries v. Tri-City Central Trades Council*, supra, in the opinion of Chief Justice Taft, it is said that the term "picket" indicates a militant purpose, inconsistent with persuasion; and that though a striker may accost an employee on the street with a view to persuade him to cease employment, persistence, importunity, and dogging the employee after the offer of information or advice is declined is unjustifiable annoyance and obstruction, which is likely soon to savor of intimidation, and from such the person sought to be influenced has a right to be free and his employer has a right to have him free. In the same case it was held that the posting of three or four groups of pickets, each group

composed of from four to twelve men who were members of various unions involved, in the street through which the employees of the plant against wnich the strike was declared had to pass to and from work, so that the passage of employees was in effect running the gauntlet, in itself was intimidation and inconsistent with peaceable persuasion. The court further held:

> "A restraining order against picketing will advise earnest advocates of labor's cause that the law does not look with favor on an enforced discussion of the merits of the issue between individuals who wish to work, and groups of those who do not under conditions which subject the individuals who wish to work to a severe test of nerve and physical strength and courage."

In the Tri-City Case one "observer" was permitted at each entrance and exit of the complainant's plant with the "right of observation, communication and persuasion, avoiding abuse, libel or threats," who in "their efforts singly should not obstruct an unwilling listener by importunate following or dogging of his steps." But this obviously was not unlawful "picketing." Inoffensive observers are lawful; militant pickets are not.

In *Truax v. Corrigan*, 257 U. S. 312, Mr. Chief Justice Taft, referring to *American Steel Foundries v. Tri-City Central Trades Council*, supra, in which

he also wrote the opinion for the Supreme Court of the United States, said:

> "We held that under these clauses picketing was unlawful, and that it might be enjoined as such, and that peaceful picketing was a contradiction in terms."

Picketing is a militant word and the act of picketing is militant in both character and purpose. Its purpose, compulsion or coercion, is accomplished only by intimidation.

The case of *People v. Harris*, 91 P. (2d) 989, relied on by petitioner is authority only for the conclusion that—under the facts of that case wherein it was expressly stipulated in an agreed statement presented to the court that the picket was carried on without intimidation or coercion and that the persons picketing did not commit any act or acts tending to intimidation or coercion in that the picketing was peacefully carried on by two of the strikers walking back and forth in front of the picketed establishment with signs stating that the business was unfair to the Denver Building Trade Council,—the right to carry on such picketing was guaranteed by the Fourteenth Amendment of the Constitution and a statute preventing such a picket was unconstitutional. The court specifically states:

> "What has been said thus far is on the assumption that violence, intimidation and coercion are foreign to peaceful picketing. No court

has ever upheld the right to injure or destroy business through a tortious act."

Assuming for the purpose of discussion that the decision in People v. Harris is sound, it is nevertheless submitted that under the facts present in this case the petitioner cannot be heard to complain for the reason that he was picketing, not peacefully, but in such manner as to constitute intimidation.

Petitioner states in his brief that the Alabama Supreme Court in the case of *Hardie-Tynes v. Cruise*, 189 Ala. 66, 66 So. 657, has definitely ascertained that Alabama's so-called anti-picketing statute prohibits "peaceful picketing" or peaceful persuasion and petitioner, therefore, concludes that the statute must be unconstitutional. However, it is to be noted that in the present case, as has been shown, the Court has not applied the statute to a peaceful picketer but has applied it to one shown to have been a member of a picket line, the main purpose of which was to threaten and intimidate.

In *Atlantic Coast Line v. Ford*, 287 U. S. 502, 505, this court stated:

> "If the assailed provisions as construed and applied in the present case, afford due process, appellants cannot complain that in earlier cases they were so construed and applied as to deny due process to other litigants. (Citing cases)."

Petitioner's insistence that in this particular case he was denied the liberties guaranteed him by the Fourteenth Amendment to the Constitution must be considered in the light of the rule that these liberties are not in any sense of the word guaranteed to be exercised in an unfettered fashion, but that the State, in the exercise of its police power, may limit the manner in which such liberties are exercised. The character of every act depends upon the circumstances in which it is done.

Schenck v. United States, 249 U. S. 47, 52;

Aikers v. Wisconsin, 195 U. S. 194, 205, 206.

Thus, it has been held that the most stringent protection of free speech would not protect a man from an injunction against uttering words that may have all the effect of force.

Gompers v. Bucks Stove & Range Co., 221 U. S. 418, 439;

Jacobson v. Massachusetts, 197 U. S. 11.

It is submitted, therefore, that since it clearly appears from the evidence that the petitioner was a member of a picket line located very close to the place of business of his former employer, and since it further appears that the petitioner was a member of a group of picketers consisting of a relatively large number, considering the location of the picket, it must be concluded that the picket was not a "peaceful picket" within the meaning of the authorities

cited by counsel for petitioner, but rather that such picket was an offensive and unjustifiable annoyance calculated to bring about public disturbances and breaches of the peace, and that the petitioner, being the champion of only his own rights, cannot invoke the jurisdiction of this Court to declare the Alabama statute unconstitutional.

III.

THE COURT SHOULD NOT TAKE JURISDICTION OF THIS PETITION FOR THE REASON THAT IF A FEDERAL QUESTION IS IN FACT PRESENTED, SUCH QUESTION IS NOT SUBSTANTIAL.

This Court has held time and again that:

> "* * * Although the validity of a law was formally drawn in question it is our duty to decline jurisdiction whenever it appears that the constitutional question is not, and was not at the time of granting the writ, substantial in character. Zucht v. King, 260 U. S. 174, 176."

As noted above, this Court has determined that a "peaceful picket" as used "implies not only absence of violence but absence of any unlawful act. It precludes the intimidation of customers. It precludes any form of physical obstruction or interference with the plaintiff's (employer's) business." *Senn v. Tile Layers Protective Union*, 301 U. S. 468, 479. In the instant case, it appearing that in truth and

in fact the picket line as set up was calculated to prevent, by force, menace or intimidation, the Brown Wood Preserving Company from employing laborers, it is respectfully submitted that under the rules heretofore announced by this Court this petition must be denied.

CONCLUSION

For the reasons hereinabove set forth, we believe that this Court does not have jurisdiction in this case, and on such reasons we base our contention that this petition for writ of certiorari should be denied, or in the alternative, we respectfully suggest that the judgment of the Court of Appeals of Alabama be affirmed.

Respectfully submitted,

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COUNSEL FOR STATE OF ALABAMA.

WILLIAM H. LOEB,

ASSISTANT ATTORNEY GENERAL,
ON THE BRIEF.